U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 16, 1993
CASE NO. 89-ERA-20 [1]

IN THE MATTER OF

MICHAEL SAMODUROV,

COMPLAINANT,

v.

GENERAL PHYSICS CORPORATION,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R.D. and 0.) of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ found that Complainant did not establish a prima facie case of a violation of the ERA and recommended dismissal. I reach the same conclusion as the ALJ through a somewhat different legal analysis that I explain below. I briefly state the facts to focus the discussion.

1. *The facts*

Complainant Michael Samodurov knew Robert Madden when they worked together at a Calvert Cliffs, Maryland nuclear power plant in the early 1980's. T. 46, 184. A few years later, Samodurov was a "sole proprietor working as an independent contractor through" Nuclear Energy Services Corporation (NES), which in turn contracted to provide Samodurov's employment services to nuclear plant owners and contractors. T. 99. Through NES, Samodurov worked in 1988 as a supervisor of technical writers producing

in-service inspection procedures for Niagara Mohawk Power Corporation's Nine Mile Point nuclear plant (Nine Mile) in New York. T. 38-39. At Nine Mile, Samodurov made verbal complaints to his Niagara Mohawk supervisor about deficiencies in the plant's quality assurance program. T. 42-44. The work that Samodurov supervised there led to the issuance of a licensee event report to the Nuclear Regulatory Commission (NRC). T. 40.

During his employment at Nine Mile, Samodurov received a phone call from his former colleague Madden, who had recognized Samodurov at a local parade. T. 47, 184. Madden was working for General Physics Corporation as a Staff Specialist conducting training classes at New York Power Authority's Fitzpatrick nuclear power plant in Oswego, New York. T. 67, 183. When Samodurov told Madden that his contract at Nine Mile was due to expire soon, Madden suggested that Samodurov send him a resume, which Madden would direct to the appropriate persons at General Physics/Oswego. T. 91, 185, 199. Madden did not have hiring authority. T. 183-184.

Samodurov testified that during the initial phone call from Madden on July 6, 1988, Samodurov mentioned having quality assurance (safety) concerns about the Nine Mile power plant. T. 47-48. Madden did not recall Samodurov's making any disclosures about quality assurance problems at Nine Mile, however. T. 185, 200. According to Samodurov, Madden told him that the General Physics training department was looking for senior reactor operators and reactor operators for some training billets at Fitzpatrick. T. 48. Madden recalled that they did not discuss specific employment opportunities at General Physics/Oswego. Madden testified that he provided the names of two General Physics/Oswego employees to contact about employment, including Madden's supervisor, Larry Lukens. T. 201.

A few weeks later, Madden spoke about Samodurov with an NES employee working at Fitzpatrick and learned that there were rumors that Niagara Mohawk had accused Samodurov of "time sheet discrepancies." T. 185-186.

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There is a dispute about whether Samodurov spoke with Madden on the telephone on August 16, 1988. Samodurov introduced into evidence his daily planner showing that he had spoken that day with Madden, CX 5, and testified that Madden provided the names of the two contacts at General Physics/Oswego during the alleged August 16 conversation. T. 52-59. Madden was absolutely sure that he did not have a phone conversation with Samodurov that day. T. 200.

It is undisputed, however, that on August 16 Madden called Gordon Hawks, a General Physics employee assigned to Nine Mile, and asked if Hawks knew Samodurov. 187-188, CX 13 p. 3. When Hawks stated that he did not know Samodurov, Madden asked him to obtain information on the rumors about the alleged time sheet discrepancies. T. 188, CX 13 p. 3. Hawks spoke with Dick Shelton, Samodurov's Niagara Mohawk supervisor, who stated that there were suspicions of time sheet problems. CX 13 p. 5. Hawks gave that information to Madden. CX 13 p. 6; T. 188.

Madden testified that he told no one in a hiring capacity at General Physics about the information he had received from Hawks.

T. 189-190. Since Madden anticipated that Samodurov would be contacting Lukens about employment, Madden sought Lukens' permission to speak with Samodurov before Lukens did. CX 12 p. 12. Madden did not reveal to Lukens the nature of the information he wished to discuss with Samodurov. T. 189-190, 192, 203, 206.

Samodurov taped part of the September 6, 1988 telephone conversation. T. 82-83, 190. According to a transcript, Madden told Samodurov that it was a "no go" on employment at General Physics' Fitzpatrick operation "until the situation has been straightened out." CX 13 p. 2. Madden explained that since Niagara Mohawk was a client of General Physics, it would be "sensitive" to hire him while the time sheet allegation was unresolved. CX 12 p. 2. Madden indicated that Samodurov should continue to pursue contacts at the General Physics home office in Maryland. T. 191, CX 12 p. 7.

The next day, Samodurov sent his resume to two persons at General Physics' home office. T. 100, RX 1, 2. In cover letters, Samodurov explained that he sought "subcontractor opportunities" with General Physics on behalf of his own company, Nucad, Inc. RX 1, 2.

The manager of General Physics' recruiting services acknowledged receiving Samodurov's resume and forwarded a summary of it to appropriate department heads for review. RX 3. She

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indicated that if General Physics did not contact Samodurov in three or four weeks, it was "probable that General Physics did not have an immediate or near-term need" for his services. RX 3, T. 114.

About four weeks after sending his resume, Samodurov filed this complaint alleging that General Physics refused to hire him because of his protected activities at Nine Mile. RX 5. Shortly thereafter, General Physics sent Samodurov an announcement of available positions and asked him to send an updated resume. T. 115-116, RX 4. Samodurov promptly responded with a corrected resume, RX 4, but he heard nothing further from General Physics. T. 117.

2. *Analysis*

a. *Covered employee*

The ALJ found that Samodurov was not an "employee" under the ERA's employee protection provision because he was an independent contractor whose only connection with General Physics was its rejection of his employment based on an unsolicited resume. R.D. and 0. at 12. I disagree.

It is well established that the ERA covers applicants for employment. *Flanagan v. Bechtel Power Corp., et al.*, Case No. 81-ERA-7, Sec. Dec., June 26, 1986, slip op. at 7, 9, and *Cowan v. Bechtel Construction, Inc.*, Case No. 87-ERA-29, Dec. and Ord. of Rem., Aug. 9, 1989, slip op. at 2 (ERA covers former employees who sought reemployment and were not hired). *See also*, *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Dec. and Order of Rem., Nov. 3, 1986, slip op. at 3 (under analogous employee protection provision Of Solid Waste Disposal Act (SDWA)). A broad interpretation of "employee" is necessary to give full effect to the purpose of the employee protection provision, which is to encourage reporting of safety

deficiencies in the nuclear industry. *See Faulkner v. Olin Corp.*, Case No. 85-SWD-3, ALJ's Recommended Decision, Aug. 16, 1985, slip op. at 6, 14-15, adopted in Sec. Final Ord., Nov. 18, 1985 (under SDWA).

Contrary to the ALJ, I do not find it significant that Samodurov initially forwarded his resume to General Physics without regard to a specific opening. See R.D. and 0. at 12. At General Physics' invitation, Samodurov later sent an updated resume in response to an announcement of openings in quality assurance. RX 4. Based on uncontroverted evidence of the telephone call in which Madden encouraged him to send his resume, and the resumes he sent to the home office, Samodurov clearly was an applicant for a position at General Physics.

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I agree with the ALJ that Samodurov sought to be hired as an independent contractor, rather than as an employee. R.D. and 0. at 12. I disagree, however, that contractor status places a complainant outside the protection of the ERA. Independent contractors may be covered employees. *Faulkner*, ALJ's Recommended Dec. at 14-15; *Royce v. Bechtel Power Corp.*, Case No. 83-ERA-3, ALJ's Recommended Dec. of Mar. 24, 1983, slip op. at 3, 9, (temporary contract worker a covered employee), *aff'd*, Sec. Dec. and Final Ord., July 11, 1985. *See also*, *McAllen v. U.S. Environmental Protection Agency*, Case No. 86-WPC-1, ALJ's Recommended Dec. and Ord., Nov. 28, 1986, slip op. at 10 (contractor covered under analogous employee protection provision of the Water Pollution Control Act, 33 U.S.C. § 1367).

In determining whether a contractor is an employee within the ERA's protection, the decisions examine the degree Of control or supervision by the respondent. *See Faulkner* and *McAllen*. Since General Physics did not hire Samodurov, there is no evidence of the degree of control it would have had over him and his work. The absence of such information in this complaint of an alleged discriminatory refusal to hire does not preclude a determination that Samodurov was a covered employee. Accordingly, I find that, as an applicant for employment as a contractor, Samodurov was a covered employee.

There is no dispute that General Physics is a covered employer.

b. *Prima facie case*

To make a prima facie case, a complainant must show that he engaged in protected activity, that the respondent subjected him to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. Complainant must also raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

Concerning protected activity, Samodurov expressed concern to his supervisor, Dick Shelton, on three occasions about deficiencies he perceived in Nine Mile's quality assurance programs. R.D. and 0. at 3. In addition, work that Samodurov supervised led to the issuance of a licensee event report to the

NRC. *Id.* at 4.

Citing the absence of a formal complaint to the NRC or formal internal safety complaint to supervisory personnel at Niagara Mohawk, the ALJ found that Samodurov did not "show, let alone prove," that he engaged in activities protected under the ERA. R.D. and 0. at 13. The ALJ requires too much for a prima facie case, however. [2] An informal safety complaint to a

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supervisor is sufficient to establish protected activity. *See, e.g., Dysert v. Westinghouse Electric Corp.*, Case No. 86-ERA-39, Final Dec. and Order, Oct. 30, 1991, slip op. at 1, 3 (employee's complaints to team leader protected); *Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Dec. and Order of Rem., Oct. 26, 1992, slip op. at 10 (employee's verbal questioning of foreman about safety procedures constituted protected activity), *appeal dismissed*, No. 92-5176 (llth Cir. Apr. 15, 1993). I find that Samodurov established that he engaged in protected activity at Nine Mile.

Absent a discriminatory reason proscribed by law, an employer is free not to hire any individual. General Physics' failure to hire Samodurov could constitute adverse action against him if it was based on his engaging in activity protected by the ERA. *See Flanagan*, *Cowan*, and *Chase* (remanding to ALJ to determine if failure to rehire former employees was unlawful under employee protection provisions).

In a case involving an alleged racially discriminatory refusal to hire, the Supreme Court outlined the required showing for a prima facie case under Title VII of the Civil Rights Act of 1974:

> (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

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McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

The *McDonnell Douglas* framework applies as well tO determining whether a complainant in an ERA case has established adverse action in the failure to hire him.

Samodurov testified that Madden informed him there were training billets for senior reactor operators and reactor operators available at General Physics' Fitzpatrick operation. Although Madden denied discussing particular employment opportunities with Samodurov, T. 185, his later actions indicate that such opportunities existed or would be available in the near future. There would be little reason for Madden to seek Lukens' permission to speak with Samodurov first, unless Lukens, who had hiring authority, might be considering Samodurov for a position.

I find that Samodurov established that there were openings at Fitzpatrick for which he was qualified and in which he expressed an interest.

I also find that Samodurov established that he was rejected for consideration for openings in the training department at General Physics/Oswego. Madden's tape recorded "no go" statement told Samodurov that it would be pointless to pursue any such opportunities at that time because of the unresolved time sheet issue. [3]

Samodurov did not introduce any evidence that after he received the "no go" message, General Physics continued to seek applicants with similar qualifications for training billet, at Oswego. [4] In the absence of evidence that General Physics sought, received applications from, or hired any similarly qualified persons for Oswego training billets, Samodurov did not establish that General physics took an adverse action against him, *See* R.D. and 0. at 14. In the absence of such a showing, Samodurov failed to establish a prima facie case under the ERA.

Even assuming that Samodurov established adverse action, he did not make the next required showing, that the respondent as aware of the complainant's protected activities when it took the adverse action. A complainant may make the required showing of knowledge either by direct or by circumstantial evidence. *Barlik v. Tennessee Valley Authority*, Case No. 88-ERA-15, Final Dec. and Order, Apr. 7, 1993, slip op. at 3, *petition for review filed*, NO. 93-3616 (6th Cir. June 4, 1993).

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Samodurov admitted that he did not inform Madden that he "had filed any safety related complaints with the NRC or had engaged in any other safety-related complaining involving Niagara Mohawk." T. 88-90. Thus, there is no direct evidence that Madden knew about Samodurov's protected activities.

Samodurov contends that to establish General Physics' knowledge, he need not have mentioned that he raised quality assurance concerns with his Niagara Mohawk management. Rather, he argues that it was sufficient that he told Madden that there were quality assurance problems at Niagara Mohawk. Comp. Br. at 26-27.

Samodurov's real argument is that Madden should have known that he had engaged in protected activities. He relies heavily on the fact that he told Madden both that he had quality assurance concerns and also that the time sheet allegation was unsubstantiated. However, two months elapsed between the time Samodurov mentioned having concerns about Niagara Mohawk's quality assurance program (July 6) and the time he discussed the time sheet allegation with Madden (September 6).

According to the transcript, on September 6, Samodurov did not bring up his safety concerns or opine that his expressing safety concerns was the real reason for the time sheet allegation. Rather, Samodurov stated that the allegation arose because:

> it was just a ... bookkeeping thing, and it really was a stupid thing and somebody had a little personal interest in trying to dig up a little dirt. Something like that, just

human stuff. . . .

* * *

if the cat's out of the bag already, I'd rather come clean with you folks and tell you exactly what's going on and why, and who was involved, and let you folks do a judgment call . . .

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CX 12 p. 5, 8. I understand Samodurov to say that a personal vendetta about a minor bookkeeping problem was behind the allegation. Samodurov introduced no evidence that he ever "came clean" and told Madden or any other General Physics personnel that he suspected that the time sheet allegation arose because he had made safety complaints.

I find that on this record, there was no reason for Madden either to suspect or assume that Niagara Mohawk made the time sheet allegation in retaliation for Samodurov's protected activity. I therefore find that Samodurov did not establish through direct or circumstantial evidence that General Physics was aware that he had engaged in protected activities while working at Nine Mile. See R. D. and 0. at 13. For this second reason, Samodurov did not establish a prima facie case.

Assuming for the sake of argument that Samodurov did establish General Physics' awareness of his protected activities, the final element of a prima facie case is raising the inference that the protected activity caused the adverse action.

Temporal proximity between the protected activity and the adverse action may be sufficient to raise the inference of causation in an ERA case. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 19. If General Physics' knew of Samodurov's protected activity, it learned the information during the July 6 telephone conversation between Samodurov and Madden. Madden informed Samodurov two months later (on September 6) that General Physics/Oswego would not consider him for employment while the time sheet allegation was unresolved. Had Samodurov established adverse action and General Physics' knowledge of his protected activity, I would find a period of two months to be sufficiently brief to raise the inference of causation in this case.

C. *Respondent's burden of production*

When a complainant establishes a prima facie case, the burden shifts to the respondent to articulate legitimate, nondiscriminatory reasons for the adverse action. *Dartley*, slip op. at 8. Assuming that Samodurov established a prima facie case, I find that General Physics met its burden of production when Madden testified about his knowledge of the time sheet allegation. Noting that Niagara Mohawk was a client of General Physics, Madden cogently explained why it would be indelicate for General Physics to hire Samodurov at a time when Niagara Mohawk suspected that he had submitted incorrect time sheets. CX 12

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p. 7; T. 204-205.

d. *Complainant's burden of persuation*

Samodurov had the ultimate burden of persuading that the legitimate reason articulated by General Physics was a pretext for discrimination, either by showing that the unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence. *Dartev*, slip op. at 8. At all times, Samodurov had the burden of showing that the real reason for the adverse action was discriminatory. *Thomas*, slip op. at 20; *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993).

I find that Samodurov did not sustain his burden of persuasion. His own evidence showed that Niagara Mohawk had accused him of the time sheet irregularities, CX 4, and Madden clearly knew about the allegation. Samodurov submitted into evidence a document purportedly showing the lack of a basis for the accusation, a letter dated September 16, 1988, from NES' Senior Vice President to Niagara Mohawk. *Id.* There is no evidence in the record that anyone told either Madden or General Physics about the exonerating letter. Thus, we are left with General Physics' knowledge of the time sheet accusation and Samodurov's failure to inform it that NES believed the accusation to be incorrect. It was therefore reasonable of Madden not to help Samodurov gain employment at General Physics/ Oswego.

I find that Samodurov did not persuade that the reason General Physics gave for not hiring him was a pretext. In addition, I find that he did not establish that General Physics declined to hire him because he engaged in protected activity. Accordingly, the complaint is DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Case No. 89-ERA-20 originally included an additional respondent, Niagara Mohawk Power Corporation, and was consolidated with No. 89-ERA-26, Samodurov v. Niagara Mohawk Power Corporation. In a March 28, 1990, Final Order of Dismissal, the Secretary dismissed Niagara Mohawk as a respondent in the two cases. Accordingly, the caption of this case eliminates mention of Niagara Mohawk and Case No. 89-ERA-26.

[2] The ALJ appears to recluire a complainant to provide something other than his own testimony about internal safety complaints to a supervisor. R.D. and O. at 13. Although corroborating evidence would certainly be welcome, it is not required for establishing a prima facie showing of protected activity. *See*, *e.g.*, *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Dec. and Order, Aug. 17, 1993, slip op. at 23(uncorroborated testimony about verbal threat to file suit to enforce environmental laws constituted protected activity), *petition for review* filed, No. 93-70834, 9th Cir. (Oct.

15, 1993).

[3] Since Samodurov relied solely upon Madden's "no go" statement to show that General Physics declined to hire him, I will focus on the same facts. Samodurov does not contend that General Physics declined to hire him for positions other than at Oswego because of his protected activities. *See* Comp. Br. at 2.

[4] Contrary to Samodurov's suggestion, Comp. Findings Of Fact and Conclusions of Law (Comp. Findings) at 29-30, it was not General Physics' burden to establish "that no other person 'with like qualifications' was hired as a RO [Reactor Operator for a training billet at General Physics/Oswego]." Under *McDonnell Douglas*, Samodurov had the burden to produce evidence that such a person was hired.